A

TAN AIK TECK

v.

TANG SOON CHYE

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ZULKEFLI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-451-2006]

C

9 AUGUST 2007

CONTRACT: *Loan - Friendly loan - Claim for repayment - Plaintiff issued two cheques to defendant that were credited into defendant's account - Whether defendant obliged to repay plaintiff amount owed - Definition*

D

of friendly loan - Whether must be between friends - Whether plaintiff entitled to repayment

This was an appeal by the defendant against the decision of the High Court allowing the plaintiff's claim for the repayment of a

E

friendly loan given by the plaintiff to the defendant. From the pleadings and the evidence given during the trial at the lower court, it was not disputed that the plaintiff did issue two cheques amounting to RM1,026,812.02 and that these two cheques were credited into the defendant's account. The defendant admitted

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that he received the money but denied that it was a friendly loan. He contended that he was not under any obligation to pay the plaintiff back the money as there was no loan extended by the plaintiff. In his submission, the defendant stated that he did not have any reason whatsoever to borrow money nor that he was in

G

need of any financial assistance at the material time as he had access to ample funds in his own bank accounts. He further submitted that it was inconceivable that the plaintiff, who earned only RM100,000 per annum, would agree to part with RM1,026,812.02 to the defendant, allegedly a "kawan biasa"

H

whom the plaintiff met only a few times. The defendant also averred that from the evidence of the plaintiff himself, the plaintiff met the defendant about two or three times before the loan was given and, as such, it could not be a friendly loan since the plaintiff could not be the defendant's friend.

I

Held (dismissing the appeal)
Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) The plaintiff admitted that there was no loan agreement in respect of the loan given to the defendant. The loan could only be proved by the two cheques which were paid into the defendant's account and also the admission by the defendant that he had put the money into his account. Since the defendant had admitted that he had received the two cheques and had credited them into his account, the plaintiff had discharged his burden that the money was a loan unless proven otherwise by the defendant. As such, the burden was on the defendant to prove that the money given to him by the plaintiff was not a friendly loan. (para 7)

(2) Although the defendant claimed that he was a very rich man with millions to his credit while the plaintiff was a poor man with no means, he admitted receiving the loan amount from the plaintiff and banking it into his account. It did not matter whether the defendant was a millionaire and the plaintiff a pauper, the undisputed fact remained that the plaintiff did issue two cheques amounting to the amount claimed to be the loan and the defendant admitted receiving those cheques and banking them into his account. It was for the defendant to explain to the court what the money was for if it was not a friendly loan. (paras 8 & 11)

(3) It may be true that the plaintiff only met the defendant two or three times before the loan transaction but the evidence showed that both of them had a common friend in the form of the plaintiff's brother-in-law, one Goh Wai Kah. The evidence showed that the defendant's request for the loan was made through Goh, whom both parties must have trusted. The defendant was under the misconception that in order to qualify for a friendly loan, the amount advanced by the plaintiff to the defendant must be between friends. A friendly loan is a loan given by the lender to the borrower based on mutual trust whereby the borrower is to repay the loan within the specified time with no interests charged. Although the plaintiff did not know the defendant that well, he gave the loan on the strength of the request by Goh, who had been the defendant's employee for 16 years. This was the answer to the defendant's contention that it was not possible for the

plaintiff to give a friendly loan when the plaintiff admitted that he had only met the defendant two or three times before the loan was given. (paras 12, 13 & 14)

(4) When the learned trial judge gave judgment in favour of the plaintiff in this case, it was obvious that he did not believe the evidence of the defendant and his sister in respect of the amount stated in the two cheques that were credited into their joint account. Taking the evidence in totality, it was clear that their evidence that the money stated in the two cheques belonged to Goh, and not the plaintiff, could not be true. This evidence was made up in order to avoid paying the friendly loan given by the plaintiff. If it were true, then the defendant could easily have brought Goh into the action as a third party. The defendant did not do so because Goh had nothing to do with the amount in respect of the loan. The allegations in regard to Goh were totally different and alien to the present action. It was clear that the learned trial judge did not believe the defendant's story and had allowed the plaintiff's claim, and this court had no reason to differ from that decision. (paras 19, 25 & 27)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi kerana membenarkan tuntutan perayu untuk pembayaran balik satu pinjaman persahabatan yang diberi oleh plaintif kepada defendan. Dari pliding dan keterangan yang dikemukakan di perbicaraan di mahkamah rendah, nyata bahawa plaintif memang ada mengeluarkan dua keping cek bernilai RM1,026,812.02 dan bahawa kedua-dua cek tersebut telah dikreditkan ke akaun defendan. Defendan mengakui bahawa dia menerima wang tersebut, namun menafikan bahawa ia adalah pinjaman persahabatan. Beliau berhujah bahawa ia tidak bertanggungan untuk membayar balik kepada plaintif oleh kerana tiada pinjaman telah diberikan oleh plaintif. Dalam hujahnya, defendan menyatakan bahawa beliau tidak mempunyai sebarang sebab untuk meminjam wang dan bahawa beliau juga pada waktu material tidak memerlukan sebarang bantuan kewangan kerana mempunyai dana yang berlebihan dalam akaunnya. Beliau juga menyatakan bahawa adalah sukar dipercayai bahawa plaintif, yang berpendapatan cuma RM100,000 setahun, boleh meminjamkan RM1,026,812.02 kepadanya, yang merupakan seorang "kawan biasa" yang ditemuinya beberapa kali. Defendan juga menyatakan bahawa dari

keterangan plaintif sendiri, plaintif telah menemui defendan hanya dua atau tiga kali sebelum memberikan pinjaman, dan dengan itu, ia bukanlah pinjaman persahabatan, kerana plaintif bukan seorang kawan defendan.

Diputuskan (menolak rayuan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Plaintif mengakui bahawa tidak ada perjanjian pinjaman dimeterai berhubung pinjaman yang diberikan kepada defendan. Pinjaman hanya boleh dibuktikan melalui dua keping cek yang dibayar kepada akaun defendan dan juga melalui pengakuan defendan bahawa ia telah mengkreditkan wang tersebut ke akaunnya. Oleh kerana defendan telah mengakui bahawa ia telah menerima kedua cek tersebut dan telah mengkreditkannya ke akaunnya, maka plaintif telah menunaikan tanggungannya bahawa wang tersebut adalah pinjaman melainkan dibuktikan sebaliknya oleh defendan. Oleh itu, tanggungan adalah atas defendan untuk membuktikan bahawa wang yang diberikan oleh plaintif kepadanya adalah bukan pinjaman persahabatan.

(2) Walaupun defendan mendakwa bahawa beliau seorang yang kaya dengan memiliki simpanan berjuta ringgit sementara plaintif pula seorang yang miskin dan tak berharta, beliau namun begitu mengakui telah menerima jumlah pinjaman tersebut dari plaintif dan telah memasukkannya ke dalam akaunnya. Adalah tidak menjadi hal sama ada defendan seorang jutawan dan plaintif seorang yang miskin. Fakta yang tidak disangkal adalah bahawa plaintif ada mengeluarkan dua cek menyamai jumlah yang dituntut dan defendan mengakui menerima cek-cek tersebut dan memasukkannya ke dalam akaunnya. Menjadi tanggungjawab defendan untuk menjelaskan apa tujuan wang tersebut jika ia bukan satu pinjaman persahabatan.

(3) Ianya mungkin benar bahawa plaintif hanya bertemu defendan sebanyak dua atau tiga kali sebelum transaksi pinjaman. Namun keterangan menunjukkan bahawa masing-masing mereka mempunyai seorang kawan, iaitu ipar plaintif yang bernama Goh Wai Kah. Keterangan menunjukkan bahawa permohonan pinjaman defendan dibuat melalui Goh, yang tentunya dipercayai oleh kedua-dua pihak. Defendan tersalah tanggap bila menyatakan bahawa untuk menjadikannya suatu pinjaman

persahabatan, jumlah yang diberi oleh plaintif kepadanya hendaklah diberi di antara kawan dengan kawan. Pinjaman persahabatan adalah pinjaman yang diberikan oleh peminjam atas dasar saling percaya mempercayai di mana peminjam akan membayar balik pinjaman dalam tempoh tertentu tanpa apa-apa faedah dikenakan. Walaupun plaintif tidak mengetahui defendan secara dekat, beliau telah memberikan pinjaman atas permohonan yang dibuat oleh Goh, yang merupakan pekerja defendan selama 16 tahun. Inilah jawapannya kepada hujah defendan bahawa adalah tidak mungkin untuk plaintif memberikan pinjaman persahabatan dalam keadaan plaintif sendiri mengakui bahawa ia hanya berjumpa defendan dua atau tiga kali sebelum memberikan pinjaman.

(4) Apabila yang arif hakim memberikan penghakiman kepada plaintif dalam kes ini, adalah jelas bahawa ia tidak mempercayai keterangan defendan serta adik perempuannya berkaitan jumlah yang dinyatakan di dalam kedua-dua cek yang dikreditkan ke dalam akaun bersama mereka. Melihat kepada keseluruhan keterangan, jelas bahawa keterangan mereka bahawa wang yang ada di dalam akaun tersebut adalah milik Goh, dan bukannya plaintif, tidak mungkin benar. Keterangan ini sengaja direka bagi mengelakkan pembayaran balik pinjaman persahabatan yang diberikan oleh plaintif. Jika ianya benar, maka defendan boleh sahaja membawa Goh ke dalam tindakan sebagai pihak ketiga. Defendan tidak berbuat demikian kerana Goh tidak mempunyai apa-apa hubungan dengan jumlah pinjaman tersebut. Alegasi berkaitan dengan Goh adalah tidak kena mengena dengan tindakan di sini. Adalah jelas bahawa yang arif hakim bicara tidak mempercayai cerita defendan sekaligus membenarkan tuntutan plaintif. Mahkamah ini tidak ada alasan untuk tidak bersetuju dengan keputusan itu.

For the appellant - Teh Meng Teck (Jayne Koe & PY Au Yong with him); M/s Cheah Teh & Su

For the respondent - A Onn (HP Chuah & Sarah Benedict with him); M/s Onn & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: D4-22-105-2002]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

[1] We have dismissed this appeal earlier and now we give our reasons for doing so. The appellant was the defendant in the court below while the respondent was the plaintiff. I will refer to the parties as they were in the court below.

[2] The plaintiff's statement of claim, *inter alia*, stated:

> 3. Pada 24.1.2000, di atas permintaan Defendan, Plaintif telah bersetuju untuk memberikan pinjaman persahabatan kepada Defendan untuk jumlah wang sebanyak RM1,026,812.02 ("Pinjaman Persahabatan").
>
> [On 24.1.2000, upon the Defendant's request, the Plaintiff agreed to grant a friendly loan to the Defendant in the sum of RM1,026,812.02 ("Friendly Loan")].
>
> 4. Di atas dasar persahabatan yang terjalin di antara Plaintif dan Defendan dan di atas niat untuk menolong Defendan, Plaintif telah memberikan Pinjaman Persahabatan kepada Defendan melalui cek-cek iaitu Bumiputra-Commerce Bank No. 095338 bertarikh 24.1.2000 untuk jumlah sebanyak RM343,186.86 dan Bumiputra-Commerce No. 095339 bertarikh 24.1.2000 untuk jumlah sebanyak RM683,625.16.
>
> **BUTIR-BUTIR**
>
> | **Cek No:** | **Jumlah** |
> |---|---|
> | BCB NO. 095338 | RM 343,186.86 |
> | BCB NO. 095339 | RM 683,625.16 |
> | Jumlah | RM1,026,812.02 |
>
> [Based on the friendship between the Plaintiff and the Defendant and with the intention of helping the Defendant, the Plaintiff granted the Friendly Loan to the Defendant *vide* cheques i.e. Bumiputra-Commerce Bank cheque No. 095338 dated 24.1.2000 for the sum of RM343,186.86 and BumiputraCommerce Bank cheque No. 095339 dated 24.1.2000 for the sum of RM683,625.16.

Particulars

Cheque No:	Amount
BCB No. 095338	RM 343,186.86
BCB No. 095339	RM 683.625.16
Total	RM1,026,812.02]

5. Oleh kerana ianya adalah suatu Pinjaman Persahabatan maka tiada sebarang perjanjian bertulis dibuat dan dimasuki oleh Plaintif dan Defendan.

   [As it was a Friendly Loan, no written agreement was prepared and entered into between the Plaintiff and the Defendant.]

6. Pada masa materia Defendan telah memberikan representasinya kepada wakil Defendan lalu berjanji akan membuat bayaran balik ke atas Pinjaman Persahabatan apabila Plaintif meminta pembayaran balik Pinjaman Persahabatan.

   [At the material time, the Defendant had represented to his agent and had promised to repay the Friendly Loan upon the Plaintiff's request for the repayment of the Friendly Loan.]

7. Memandangkan Pinjaman Persahabatan telah diberikan pada 24.1.2000 dan sehingga ke tarikh Pernyataan Tuntutan sudah hampir lebih kurang dua tahun, namun Defendan masih belum dapat membuat sebarang bayaran kepada Plaintif walaupun Plaintif telah membuat permintaan untuk pembayaran balik Pinjaman Persahabatan.

   [Although the Friendly Loan was given on 24.1.2000 and almost two years had lapsed as at the date of the Statement of Claim, the Defendant has yet to make any payment to the Plaintiff although the Plaintiff had requested for the repayment of the Friendly Loan.]

8. Plaintif telah melalui beberapa surat dan secara perjumpaan dengan Defendan dan/atau wakil Defendan, meminta Defendan untuk memulakan sekurangkurangnya secara beransur-ansur pembayaran balik Pinjaman Persahabatan.

   [The Plaintiff had *vide* several letters to and meeting with the Defendant and/or the Defendant's agent, requested the Defendant to, at the very least, start making repayments of the Friendly Loan in instalments.]

9. Namun Defendan sehingga kini masih gagal menunjukkan sebarang usaha untuk membuat bayaran kepada Pinjaman Persahabatan.

[However, the Defendant has todate failed to show any efforts to repay the Friendly Loan.]

10. Plaintif telah melalui peguamcaranya, Tetuan Khaw & Partners menuntut daripada Defendan bayaran terhadap Pinjaman Persahabatan. Akan tetapi sehingga ke tarikh ini Defendan masih gagal, enggan dan/atau cuai untuk mematuhi notis tuntutan tersebut.

[The Plaintiff has vide his solicitors, Messrs Khaw & Partners demanded from the Defendant the repayment of the Friendly Loan. However, todate the Defendant has failed, refused and/or neglected to comply with the said notice of demand.]

11. Oleh yang demikian, Plaintif menuntut daripada Defendan:

a) Penghakiman ke atas RMl ,026,812.02;

b) Faedah 8% ke atas RMl,026,812.02 dikira dari tarikh penghakiman sehingga penyelesaian penuh;

c) Kos; dan

d) Lain-lain relif atau remedi yang Mahkamah Yang Mulia ini anggap adil dan munasabah.

[Wherefore, the Plaintiff claims from the Defendant:

a) Judgment for the sum of RMl ,026,812.02;

b) Interest at 8% on the sum of RMl ,026,812.02 calculated from the date of judgment until full settlement;

c) Costs; and

d) Such other reliefs or remedies that this Honourable Court deems just and reasonable.]

[3] The defendant in his statement of defence stated:

2. The Defendant denies ever requesting the Plaintiff for a friendly loan as alleged or at all. The Plaintiff is put to strict proof thereof.

3. The Defendant further avers as follows:

A

(a) The amount of RMl,026,812.02 was not a loan given by the Plaintiff to the Defendant but was for a totally different purpose full particulars of which are within the knowledge of the Plaintiff and/or his agent one Goh Wai Kah, a brother-in-law of the Plaintiff.

B

(b) The amount of RMl,026,812.02 was certainly not a friendly loan since the Defendant is not even a friend nor an acquaintance of the Plaintiff. This was made clear to the Plaintiff's previous solicitors Messrs Khaw & Partners ("K&P") *vide* a letter from Messrs Cheah Teh & Su, the Defendant's solicitors, to K&P dated 30/5/2001. Said letter of 30/5/2001 was written in response to K&P's letter to the Defendant dated 10/5/2001 demanding the aforesaid sum of RMl,026,812.02.

C

4. Save and except that the Defendant received the cheques averred in paragraph 4 of the Statement of Claim, the rest of paragraph 4 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof. In this regard, the Defendant further repeats paragraph 3 above.

D

5. On account of the facts and matters set out in paragraph 3 above, the Defendant categorically denies paragraphs 5, 6 and 7 of the Statement of Claim.

E

6. Save and except that the Defendant had received only 1 solitary letter from K&P dated 10/5/2001 (the very same letter referred to above), the rest of paragraph 8 of the Statement of Claim is categorically denied.

F

7. On account of the matters set out above, paragraph 9 of the Statement of Claim is wholly misconceived and unfounded.

G

8. Save and except that the Defendant confirms having received said letter from K&P dated 10/5/2001, the rest of paragraph 10 of the Statement of Claim is wholly misconceived and baseless given the fact that the Defendant did not take any loan from the Plaintiff and is not liable to the Plaintiff in any way whatsoever.

H

9. In the circumstances, paragraph 11 of the Statement of Claim is untenable.

10. Save as in hereinbefore expressly admitted the Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set forth and specifically traversed seriatim.

I

11. Wherefore the Defendant prays that the Plaintiff's claim be dismissed with costs.

[4] The learned judge who heard this case after a full hearing gave decision in favour of the plaintiff. Unfortunately, there was no written judgment by the learned trial judge. The hearing of this appeal was heard without the judgment as directed by another panel of this court.

[5] In this case the plaintiff's claim was for the repayment of a friendly loan given by him to the defendant. From the pleadings and the evidence given during the trial at the lower court, it is not disputed that the plaintiff did issue two cheques amounting to RM1,026,812.02 and these two cheques were credited into the account of the defendant. The defendant admitted these two cheques were credited into his account or that of his nominee. This is the money which the plaintiff claimed to be the friendly loan given to the defendant. The defendant, although admitted that he received the said money, denied that it was a friendly loan.

[6] The defendant in his submission stated that although he had received the amount stated, he was not under obligation to pay back the plaintiff as there was no loan extended by the plaintiff. In other words, the defendant disputed that it was a friendly loan.

[7] The plaintiff admitted that there was no loan agreement in respect of the loan given to the defendant. The loan given could only be proved by the two cheques which were paid into the defendant's account and also the admission by the defendant that he had put the money into his bank account. Since the defendant had admitted that he had received the two cheques and had credited them into his account, I am of the view that the plaintiff had discharged his burden that the money was a loan unless proven otherwise by the defendant. As such, the burden is on the defendant that the money given to him by the plaintiff was not a friendly loan.

[8] The defendant claimed that he is a very rich man with millions to his credit while the plaintiff is a poor man with no means. Yet he admitted receiving the loan amount from the plaintiff and banked it into his account.

[9] In his submission the defendant stated that the defendant did not have any reason whatsoever to borrow money nor was the defendant in need of any financial assistance at the material time, ie, January 2000, as the defendant had access to more than ample funds. The defendant had total deposits amounting to RM1,500,807.35 in the defendant's UOB accounts as at 31 December 1999 (out

of which RM817,147.31 was in deposits), had total deposits amounting RM1,039,121.68 in the defendant's UOB accounts as at 31 January 2000 and the defendant had a sum of RM1,251,648.57 in the defendant's Maybank joint account which the defendant held with the defendant's sister, Tan Lay Lee (DW2), even before the plaintiff's cheques for the sum of RM343,186.86 and RM683,625.16 respectively were deposited into the defendant's said Maybank joint account. The defendant further submitted that his sister, Tan Lay Lee, had given evidence in the court below that she would have lent to the defendant any amount of money if he needs it. She had with her total deposits amounting to RM909,679.97 in her UOB accounts as at 31 December 1999 and total deposits amounting to RM412,098.48 in her UOB accounts as at 31 January 2000. In addition, the defendant submitted that at the material time the defendant and his sister owned various properties which were unencumbered, whether personally or indirectly through several investment companies of which the defendant was a shareholder together with his other family members.

[10] The defendant further submitted that, it is inconceivable that the plaintiff who earns only RMl00,000 per annum would agree to part with RM1,026,812.02 to the Defendant who is allegedly a "kawan biasa" whom he allegedly met only once or twice. The defendant stated that the plaintiff is a contractor and his annual income in 1998, 1999 and 2000 was "satu ratus ribu lebih", "lebih 10-20% dari 1998" and "lebih kurang dengan tahun 1999" respectively, the plaintiff did not even have any money to lend to anyone in 1999 and he had to dispose of 392 lots of Tenco Berhad shares in January 2000 before he could lend any money to the defendant.

[11] In my view, it does not matter whether the defendant was a millionaire and the plaintiff was a pauper, the undisputed facts remain that the plaintiff did issue two cheques amounting to the amount claimed to be the loan and the defendant admitted receiving those cheques and banked them into his account. As I have stated earlier, it is for the defendant to explain to the court what was the money for if it was not a friendly loan.

[12] The defendant contended that he hardly knew the plaintiff before the friendly loan was given to the defendant. As such the plaintiff could not be his friend. The defendant contended that from the evidence of the plaintiff himself, the plaintiff met the

defendant about two or three times before the loan was given and as such it could not be a friendly loan. It is clear to me that the defendant, in particular his counsel, was under the misconception what is meant by a friendly loan. A friendly loan is opposed to the normal borrowing from a moneylender or financial institution. A friendly loan is a loan between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will be no interest imposed. It may be true that the plaintiff met the defendant two or three times before the loan transaction but the evidence shows that both of them have a common friend in the form of the plaintiff's brother-inlaw. The evidence shows that the defendant's request for the loan was made through this brother-in-law, Goh Wai Kah. Both parties must have trusted this Goh Wai Kah. After considering the evidence and the submissions, I am of the view that the defendant was under the misconception that in order to qualify for a friendly loan, the amount advanced by the plaintiff to the defendant must be amongst friends. This can be seen from the letter written by the defendant's solicitors to the plaintiff's previous solicitors dated 30 May 2001 which stated as follow:

> Our client is shocked to receive your client's demand for payment of the sum of RM1,026,812.02 being the so-called friendly loan granted to our client on 24.1.2000. Our client would like to state for the record that there was no friendly loan extended by your client as alleged or at all.
>
> We are further instructed by our client to state that your client is at all material times aware that the sum of RM1,026,812.02 was not a friendly loan since our client is not even a friend nor acquaintance of your client. Our client therefore categorically denies being indebted to your client as alleged or at all.

[13] In my view, the defendant had been wrongly advised by his solicitors that in order to qualify for a friendly loan, the loan must be between friends. In my view, a friendly loan is a loan given by the lender to the borrower based on mutual trust whereby the borrower was to repay the loan within the specified time with no interests charged. For the reasons I have stated, I see no merit in the contention of the defendant in respect of this.

[14] The plaintiff in his evidence stated that sometime in January 2000, his brother-in-law, Goh Wai Kah, came to see him and asked the plaintiff whether the plaintiff could give a friendly loan to his boss, the defendant. The said Goh Wai Kah told the

plaintiff that the defendant needed the loan in order to purchase Tenco Berhad shares. At that time the said Goh Wai Kah was working with the defendant at Tenco Berhad as its Managing Director. The said Goh Wai Kah told him that the defendant offered shares as security of the said loan. The plaintiff believed his brother-in-law and gave the two cheques to the defendant even though the defendant did not deposit the shares to him as security. In other words, though the plaintiff did not know the defendant that well he gave the loan on the strength of the request by his brother-in-law who was an employee of the defendant for 16 years before the loan was given. This, in my view, is the answer to the defendant's contention that it was not possible for the plaintiff to give a friendly loan when the plaintiff admitted that he had met the defendant twice or three times before the loan was given.

[15] The defendant contended that the plaintiff categorically stated in his witness statement (PW1) that after he agreed to extend the loan to the defendant, he started selling his Tenco Berhad shares. The defendant, however, submitted that after the trial which commenced on 17 April 2006 which was adjourned for continued hearing on 19 April 2006, the plaintiff appeared to have had a sudden attack of selective amnesia because when questioned as to when he started selling his Tenco Berhad shares, the plaintiff conveniently claimed that he could not remember. This sudden loss of memory in his answers to the interrogatories may have something to do with the fact that he realized after the trial was adjourned that the story he concocted in his witness statement of 14 April 2006 did not match the documentary evidence. When cornered, loss of memory was a convenient escape route of sorts. However, given the fact that the purported approach for a loan was first made in January 2000 and the purported loan was made on 24 January 2000, how more absurd can the plaintiff's answer of "tak ingat" be. Goh Wai Kah also claimed that he could not confirm that the plaintiff only started to sell the Tenco Berhad shares after he agreed to extend the friendly loan to the defendant. The defendant submitted that it follows that if the sale of the Tenco Berhad shares had commenced on 27 December 1999, there is no way that the approach for the purported friendly loan could have been made in January 2000 as alleged by the Plaintiff and Goh Wai Kah, and consequently, the alleged agreement to extend the purported friendly loan to the defendant could have been in January 2000 or on 24 January 2000.

[16] There may be discrepancies as to the actual dates as alleged by the defendant but we have to consider that the loan transaction took place about six years before the trial. Looking at the sale of the shares which was said to have started on 27 December 1999 and the loan was on 24 January 2000; they all took place within the space of one month. As such, there is nothing improbable about the transaction because it is impossible for anyone to remember the actual dates unless they have recorded them somewhere. At the time when the plaintiff was said to have disposed of the shares, it is not disputed that the defendant had already received the two cheques belonging to the plaintiff and the defendant had credited the sums stated in the two cheques into his joint account. Anyway, in my view, it does not matter how the plaintiff got the amount because that was the amount admitted by the defendant to have been credited into his joint account at Maybank. This is confirmed by the bank statement.

[17] From the record, the defendant's statements in respect of the two cheques are as follows:

> 33. *Why were the Plaintiff's cheques, ie, BCB cheque no. 095338 for the sum of RM343,186.86 and BCB cheque no. 095339 for the sum of RM683,625.16, totalling RM1,026,812.02 issued and made payable to you?*
>
> Goh had requested me to do him and a few other persons a favour by agreeing to be the recipient of proceeds of sale of 383,000 Tenco shares. Goh who was then the Managing Director of Tenco had some concerns about the proceeds of sale of Tenco shares (which was then parked in the Plaintiff's CDS (Central Depository System) Account and requested me to receive the proceeds totalling RM1,026,812.02 into my account.
>
> Goh told me that the Plaintiff was a nominee for Goh in respect of Goh's 2% equity in Ridgemonde Chemicals & Resins Sdn Bhd. I was also informed by my nephew, Leong Chun Yin, that prior to the injection of RCR into Tenco, it was agreed by all the shareholders of RCR that 4% of the eventual Tenco shares to be issued after the restructuring of Tenco (the consideration shares) was to go to outside parties – such 4% to be taken from each and every shareholder of RCR proportionate to their respective shareholdings.

As a result, Goh's 2% equity interest in RCR would accordingly be reduced to only 1.92% (after deducting 4% out of the 2% equity). The shareholders of RCR further agreed to Goh's suggestion that the 4% meant for outside parties be parked equally with Goh's brother-in-law, ie, the Plaintiff and the mother-in-law of one Mun Keng Leng, a former Executive Director of Tenco, so that each of the 2 nominees would hold an additional 2% for outside parties.

Consequently, the Plaintiff would end up holding 3.92% equity in RCR on paper. Arising from the Tenco's restructuring, the 3.92% equity held by the Plaintiff (as nominee) was exchanged for 392,000 Tenco shares which were then issued to the Plaintiff.

At the time Goh made his request, our relationship was good and as I did not foresee that this would be a problem nor expect to be sued for the repayment of a purported friendly loan, I agreed to his request.

34. *Please refer to page 366 of the Common Bundle of Documents – What is this document?*

This is a copy of the General Announcement made by Tenco to the then KLSE pertaining to the restructuring exercise carried out by Tenco in 1999 whereby pursuant to the said restructuring exercise, Tenco would acquire amongst others the total issued and paid up capital of RCR for a total consideration of 10,000,000 new ordinary shares in Tenco.

Prior to the restructuring of Tenco, the Plaintiff was the registered shareholder of 23,520 ordinary shares in RCR representing 3.92% of the total paid up capital of RCR.

Arising from the said restructuring exercise, the Plaintiff received 392,000 shares in Tenco as consideration for "his" 3.92% equity interest in RCR (actually Goh's and the other parties' interest).

35. *Please refer to pages 461 to 466 of the Common Bundle of Documents – Can you please tell the Court what these documents are?*

These are the share certificates of RCR which show that the Plaintiff was the registered shareholder of 23,520 ordinary shares in RCR.

36. *Please refer to pages 367, 368 & 369 of the Common Bundle of Documents – Can you please tell the Court what these documents are?*

These are copies of e-mails which confirm that the Plaintiff was holding the 392,000 Tenco shares as a nominee for Goh and outside parties whereas Mun Keng Leng's mother-in-law was holding 392,000 Tenco shares as a nominee for Mun Keng Leng and outside parties.

37. *How did come into your possession of these documents at pages 367 to 369 of the Common Bundle of Documents?*

These e-mails were faxed by Goh to my nephew, ie, Leong. My nephew recently discovered them in the course of going through his documents at my request in the course of preparing for my trial and he handed over said e-mails to me.

38. *What did you do with the Plaintiff's cheques?*

I passed the Plaintiff's 2 cheques to my sister, Tan Lay Lee, to be banked into our joint account in Maybank. Please refer to page 381 of the Common Bundle of Documents – this is my Maybank bank statement dated 15.02.2000 which shows that the Plaintiff's cheques for the sum of RM683,625.16 and RM343,186.86 respectively were banked into my account on 26.01.2000 and cleared on 27.01.2000.

The total of these 2 sums, i.e. RM1,026,812.02, represents the proceeds of sale of exactly 383,000 Tenco shares sold by Goh through the Plaintiff in January 2000.

39. *What happened to the money?*

The money was subsequently disbursed to Goh with some balance retained by me for my services.

40. *How was the money disbursed to Goh?*

Goh would call me and let me know that he needed a specific sum of money to be disbursed to him. I would then inform my sister, Tan Lay Lee of Goh's request as she would be the one preparing the cheques. Thereafter, I would go to the Bank with my sister to encash the cheques and pass the cash to Goh at his office.

41. *When was the money disbursed to Goh?*

The money was disbursed to Goh over a period of 3 months, ie, January 2000 to March 2000, on 5 different occasions, namely:

A

i) On 26.01.2000 – the sum of RM248,000.00 was disbursed *vide* MBB cheque no. 166556 dated 26.01.2000. This was a cash cheque.

Please see the Maybank bank statement dated 15.02.2000 at page 381 of the Common Bundle of Documents.

B

Please see the MBB cheque no. 166556 dated 26.01.2000 at page 376 of the Common Bundle of Documents.

C

ii) On 17.02.2000 – the sum of RM34,957.54 was disbursed *vide* MBB cheque no. 166566 dated 15.02.2000. This cheque was made payable to Goh.

Please see the Maybank bank statement dated 15.03.2000 at page 384 of the Common Bundle of Documents.

D

Please see the MBB cheque no. 166566 dated 15.02.2000 at page 382 of the Common Bundle of Documents.

E

iii) On 21.02.2000 – the sum of RM100,000.00 was disbursed *vide* MBB cheque no. 166571 dated 18.02.2000. This was a cash cheque.

Please see the Maybank bank statement dated 15.03.2000 at page 384 of the Common Bundle of Documents.

F

Please see the MBB cheque no. 166571 dated 18.02.2000 at page 383 of the Common Bundle of Documents

G

iv) On 22.03.2000 – the sum of RM392,416.00 was disbursed *vide* MBB cheque no. 596141 dated 21.03.2000. This was also a cash cheque.

Please see the Maybank bank statement dated 15.04.2000 at page 387 of the Common Bundle of Documents

H

Please see the MBB cheque no. 596141 dated 21.03.2000 at page 385 of the Common Bundle of Documents.

I

v) On 27.03.2000 – the sum of RM224,000.00 was disbursed *vide* MBB cheque no. 596144 dated 27.03.2000. This was also a cash cheque.

Please see the Maybank bank statement dated 15.04.2000 at page 387 of the Common Bundle of Documents

Please see the MBB cheque no. 596144 dated 27.03.2000 at page 386 of the Common Bundle of Documents

42. *You mentioned earlier that some balance was retained by you for your services – how much was retained by you for your services?*

About RM27,000.00.

43. *Have you ever received any requests or reminders from the Plaintiff for the repayment of the purported friendly loan, whether directly or indirectly, prior to the commencement of this suit?*

No, I have never received any requests or reminders from the Plaintiff for payment of the purported friendly loan.

44. *Did you receive any letters from the Plaintiff requesting for the repayment of the purported friend loan?*

No, I did not receive any letters whatsoever from the Plaintiff requesting for the repayment of the purported friendly loan.

45. *Were there any meetings held between the Plaintiff and you and/or between the Plaintiff's agent, ie, said Goh and you pertaining to the repayment of the purported friendly loan?*

No meetings were ever held pertaining to the repayment of the purported friendly loan, whether between the Plaintiff and me or between said Goh and me. In fact, I have never had any meetings with the Plaintiff at all.

[18] The evidence of Tan Lay Lee in respect of the two cheques is as follows:

6. *Do you have a joint account with your brother, Tan Aik Teck, ie, the Defendant in this action?*

Yes, I have a joint account with my brother in Malayan Banking Berhad.

A

7. *Were you aware that on 26.01.2000, two (2) cheques made payable to the Defendant amounting to RM1,026,812.02 were banked into the said Maybank account?*

Yes, I was.

B

8. *Did you know why the said cheques were issued to your brother?*

Yes, as my brother had informed me of Goh's request for a favour.

9. *To the best of your knowledge, did the Defendant have any reason* C *to borrow money in the sum of RM1,026,812.02 from the Plaintiff?*

No, he did not. Even if my brother required any financial assistance (which I was not aware), he would have approached his siblings as we had the means to lend him the D million ringgit which the Plaintiff alleged he loaned to my brother.

I would not expect my brother to borrow money from someone who is neither a friend, relative, associate nor even an acquaintance but merely a person whom we know of to E be a brother-in-law of one of our exsubordinates.

10. *If indeed the Defendant required financial assistance in January 2000, would you have assisted him?*

Of course I would have. F

11. *Did you have sufficient funds to provide him with the financial assistance?*

Yes, I did.

G

12. *Please refer to pages 370 & 371 of the Common Bundle of Documents – Can you please tell the Court what this document is?*

This is my UOB bank statement for the month of December 1999 which shows that as at 31.12.1999,1 had total deposits amounting to RM909,679.97 in my UOB accounts. H

13. *Please refer to page 378 of the Common Bundle of Documents – Can you please tell the Court what this document is?*

This is my UOB bank statement for the month of January 2000 which shows that as at 31.01.2000,1 had total deposits I amounting to RM412,098.48 in my UOB accounts.

14. *Apart from cash in your bank accounts, do you have any other assets?* A

Yes, I own various properties which are unencumbered, whether personally or indirectly through several investment holding companies of which I am a shareholder together with my other family members. B

...

16. *Has Goh ever requested for any financial assistance from you?*

Yes, he has. Goh had between August 1997 to November 1997 requested for and obtained interest free friendly loans totalling RM580,000.00 from me. C

17. *Did Goh repay the RM580,000.00 he borrowed from you?*

He only made 2 partial repayments of RM30,000.00 each in January and February 2000 totalling RM60,000.00 but failed to pay the balance RM520,000.00. D

18. *Did you take any action to recover the balance of the friendly loan from Goh?* E

Yes, I did. When Goh ignored my requests for repayment of the balance of the friendly loan, I instructed my solicitors to issue a letter of demand to him. However, as Goh ignored the demand for repayment of the friendly loan, I then instructed my solicitors to file a suit against Goh in the Kuala Lumpur High Court for the recovery of the balance of the friendly loan. My suit against Goh was registered as Kuala Lumpur High Court Suit No. Dl-22-1445-2001. F

19. *What is the status of your suit against Goh?*

The Senior Assistant Registrar allowed my application for summary judgment against Goh on 19.07.2002 and Goh's appeal to the Judge in Chambers was also dismissed by the learned Judge on 17.02.2003. G

20. *Did Goh pay you the judgment sum?* H

No, he did not pay me the judgment sum.

21. *What did you do then?*

I commenced bankruptcy proceedings against him in the Shah Alam High Court *vide* Shah Alam High Court Bankruptcy No. 29-6562-2002. I

22. *What happened after the commencement of bankruptcy proceedings against Goh?*

Goh still failed and/or refused to settle the judgment sum. Eventually, Goh was adjudicated a bankrupt by the Shah Alam High Court on 24.06.2003.

23. *Are you aware of what happened to the money, ie, the sum of RM1,026,812.02 banked into your Maybank joint account?*

The bulk of the money was withdrawn from the joint account between January 2000 and March 2000. Furthermore, a cheque in the sum of RM34,957.54 was issued to Goh from the RM1,026,812.02 received and the remaining balance was retained by my brother for his services.

24. *Please tell the Court more about the withdrawals of monies from the joint account.*

Whenever my brother receives a call from Goh to say that he needed a specific sum of money to be disbursed to him, my brother would inform me to prepare the cheques (as I have custody of the cheque book).

I would thereafter contact the bank officer to make the necessary arrangements to draw out the money because on most occasions, Goh wanted the money to be disbursed to him in the form of cash.

Thereafter, I would go to the bank with my brother to encash the cheques and then hand the money over to Goh at Goh's office.

25. *When was the money withdrawn or paid out?*

The money save and except the balance retained by my brother for services rendered, was withdrawn/paid out over a period of 3 months, ie, January 2000 to March 2000, on 5 different occasions, namely:

i) On 26.01.2000 – the sum of RM248,000.00 was disbursed *vide* MBB cheque no. 166556 dated 26.01.2000. This was a cash cheque.

ii) On 17.02.2000 – the sum of RM34,957.54 was disbursed *vide* MBB cheque no. 166566 dated 15.02.2000. This cheque was made payable to Goh.

iii) On 21.02.2000 – the sum of RM100,000.00 was disbursed *vide* MBB cheque no. 166571 dated 18.02.2000. This was a cash cheque.

iv) On 22.03.2000 – the sum of RM392,416.00 was disbursed *vide* MBB cheque no. 596141 dated 21.03.2000. This was also a cash cheque.

v) On 27.03.2000 – the sum of RM224,000.00 was disbursed *vide* MBB cheque no. 596144 dated 27.03.2000. This was also a cash cheque.

26. *The cheques were encashed by you on all those occasions?*

Yes, except for the cheque issued in the name of Goh.

[19] When the learned judge gave judgment in favour of the plaintiff in this case, it is obvious to me that the learned trial judge did not believe the defendant's and his sister's evidence in respect of the amount stated in the two cheques which was credited into their joint account. Since there was no written judgment from the learned trial judge to indicate why he did not believe them, it is obvious to me that the extracts above were the reason for the disbelief. First of all, the evidence by both of them is exactly the same as if they have been tutored as to the number of cheques and the amount disbursed and where it was disbursed. Further, in all cases of cash withdrawals, both the defendant and his sister had gone together to the bank to cash the cheques. I see no reason why they must go together after they have signed the cheques. In my view, it is sufficient for the defendant alone or together with Goh for security reasons to go to cash those cheques. To me, the only reason why they must go together was that neither the defendant nor the sister trusted each other in respect of the cash cheques. Except for the words of the defendant and his sister that the money was handed to Goh, there was no other evidence to confirm this. To me the easiest way would be to issue those cheques in the name of Goh rather than cash cheques.

[20] Secondly, the defendant and his sister gave evidence they were prudent businessman and businesswoman. It is strange to me for a cheque of only RM34,957.54, it was issued in the name of Goh whereas for cheques where the amount exceeded RM100,000 they were issued as cash cheques. Added to this was that the cash cheques were cashed by the defendant and his sister and not by Goh. If they were cash cheques it is more

A logical to hand the cheques to Goh so that he himself could cash them and they would then be evidence against Goh because his signature and his identification would be on those cheques. In my view, the cash from those cheques were never paid to Goh but were utilised by the defendant and his sister. To me, the evidence
B of the defendant and his sister is more farfetched than the evidence of the plaintiff.

[21] Thirdly, the evidence of the defendant and his sister in respect of the plaintiff's two cheques which were deposited into
C their joint account with Maybank. This is shown in the bank statement dated 15 February 2000. Perusing the bank statement on 11 February 2000 there was a fund transfer from that to another account of almost RM2 million and leaving only RM914,925.01 in the joint account. That RM2 million is clearly
D not the payment to Goh. Without the money from the two cheques issued by the plaintiff, the defendant's joint account would be in the red. Even though the defendant and the sister claimed to be very very rich, the evidence shows otherwise. The evidence from the bank statement shows that in one day there
E were millions in the credit but within the next few days the money disappeared. The evidence also shows that the money from the plaintiff kept the joint account in credit.

[22] Fourthly, the evidence given by the defendant and the sister
F that on 26 January 2000 a sum of RM248,000 was paid to Goh. The money was drawn out by way of cash cheque and cashed by the defendant and the sister. From the same bank statement I notice that this money was drawn out before the two cheques of the plaintiff were cleared. As the defendant and the sister have
G claimed that they were good and successful businessman and businesswoman, how could they allow Goh to have the money before the two cheques were cleared.

[23] Fifthly, there were three bank statements tendered in court, namely, statements dated 15 February 2000, 15 March 2000 and
H 15 April 2000. There are so many cash withdrawals in those statements and yet the defendant identified those five cheques and not other cheques. There are no notes on those cheques except the crossed cheque issued in the name of Goh, to connect the cheques with Goh. Those five cheques were chosen by the
I defendant because the total amount is almost RM1 million. This is the most convenient way of dealing with the loan of the plaintiff.

[24] The sixth reason is the evidence of the defendant and the sister in respect of the borrowing by Goh. The sister gave evidence that Goh had borrowed money from her sometime in August 1997 to November 1997 totalling RM580,000 and Goh only paid back RM60,000 in January and February 2000. As a result of the non-payment of the loan she took action against Goh sometime in 2001. It is rather strange to me that there was a sum of more than RM1 million in her joint account in January 2000 to March 2000 purportedly belonging to Goh and yet she did not retain the amount of RM500,000 as repayment of the money borrowed by Goh. If she had done so, then there was no necessity to sue Goh. For that reason it is difficult to believe her evidence.

[25] Taking the evidence in totality, it is clear to me that the evidence of the defendant and his sister that the money stated in the two cheques belonged to Goh and not the plaintiff could not be true. This evidence was made up in order to avoid paying the friendly loan given by the plaintiff. If it is true then the defendant could easily have brought in Goh into the action as a third party. The defendant did not do so because Goh had nothing to do with the amount in respect of the loan. The alleged borrowing by Goh or selling the shares and requesting the proceeds to be kept by the defendant was totally different and alien to the present action.

[26] In respect of the cheque No. 166566 for the sum of RM34,957.54, Goh explained that this was payment for works done when he was the managing director of Tenco Berhad and had nothing to do with the loan by the plaintiff.

[27] It is clear to me that the learned trial judge did not believe the defendant's story and allowed the claim by the plaintiff. We have no reasons to differ from him and for that reason the appeal by the defendant is hereby dismissed with costs. The deposit is to the account of taxed costs.

[28] My learned brothers, Zulkefli Ahmad Makinudin and Suriyadi Halim Omar JJCA, had seen the judgment in draft and had conveyed their agreement to it.